The labels as such are not likely to be confused the one with the other.

I must therefore come to the following conclusions:—

(a) That the Opponents have not proved that they are entitled to the sole use of the words Kim Chee Tah or the Chinese characters 金字塔 apart from and divorced from their mark as a whole,

(b) That the mark in respect of which the Registration is applied for by the Applicants is not by itself similar to that used by the Opponents,

(c) That it is not proved that the mark of the Applicants will be generally referred to as "Kim Chee Tah Brand",

(d) That it is more likely to be referred to as "Sam Kok Brand."

It follows therefore that the use of the mark will not be likely to deceive or cause confusion.

By virtue therefore of the discretion given me by the Trade Marks Ordinance, I decide that the mark shall be entered upon the Register upon payment of the usual fees.

Costs will be awarded to the Applicants.

Order accordingly.

F. M. S. REPORTS.

LEE LAI FONG vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Horne, J.) July 21, 1941]

Road Traffic Enactment (17 of 1937), sections 12, 51, 80 and 113 — "Using" a motor vehicle — Whether paid driver can be said to use the vehicle in contravention of the provisions of section 12, section 51 or section 80 — Whether paid driver can in any circumstances abet the commission of offences against these sections — Effect of presumption established by section 113 — Rebuttal of such presumption.

The appellant was the driver, on three occasions, of a motor vehicle which was licensed and insured only as a private vehicle but which was carrying passengers who, the Magistrate found as a fact, had paid fares for their transport. The appellant was charged, in respect of each of these occasions, with having committed three separate offences of "using" the vehicle, contrary to the provisions of section 12, section 51 and section 80 of the Enactment respectively. The appellant was the son of the owner of the vehicle but was employed and paid by him to drive the car.

Held, (a) that the hired driver of a motor vehicle cannot be convicted of "causing the vehicle to be used" contrary to the provisions of section 80 (1).

(b) that a hired driver cannot be convicted of abetting the owner to "cause" the vehicle to be used contrary to the provisions of section 80; and

(c) that a hired driver cannot be convicted of abetting the owner to commit an offence against section 12 unless there is a finding that the owner himself caused or permitted the vehicle to be used contrary to the provisions of that section.

Appeal from the decision of the Magistrate, Seremban.

On a number of dates in November and December of 1940 the appellant was observed to be driving a car containing a varying number of passengers. The car was the property of his father and was licensed and insured only as a private motor vehicle. In respect of each of three of such dates the appellant was charged with the following offences against the Road Traffic Enactment 1937:—

(a) using the motor vehicle as a public service vehicle contrary to the provisions of section 12 (3);

(b) using the motor vehicle without a policy of insurance which complied with the requirements of Part II, an offence under the provisions of section 51 (3); and

(c) using the motor vehicle as a stage carriage, contrary to the provisions of section 80.

The appellant gave evidence and called witnesses with a view to establishing that the passengers were coolies and clerks employed by the owner of the car or other persons having business relations with the owner, and that none had paid any fare.

The Magistrate found that the presumption, established by the provisions of section 113 (2) of the Enactment, that the passengers had paid for their transport, was not rebutted by the evidence called for the defence, which he found to be untrue. The Magistrate further found that, since the insurance of the car did not cover its use for hire by passengers, there was a *prima facie* case, which had not been rebutted, that the car was not insured as required by the Enactment. He therefore convicted the appellant on all nine charges preferred against him and inflicted fines totalling ninety-six dollars. The appellant appealed.

Cases referred to:—

(1) *Low Ah Seng v. P. P.* 1946 M.L.J. 48.

(2) *Morris v. Tolman* (1923) 1 K.B. 166.

Edgar Joseph for appellant: The charge is wrong. Section 80 (6) can only be directed against the owner.

In this case the appellant is a paid servant of the owner.

Although the appellant was seen driving the vehicle on a number of days he was not the person responsible for the user; in other words he did not cause the user.

In the absence of any finding against the owner of the vehicle, who is the principal, the appellant cannot be charged with abetment.

As regards section 51 (1). This applies only to the person who is responsible for the vehicle, and that is the owner and not a hired driver.

The appellant moreover has rebutted the presumption arising under section 113 by calling evidence and also by giving evidence himself on oath that the persons who were conveyed on the various dates mentioned by the prosecution were coolies of his employer and no fares were collected from them.

A. J. Grattan-Bellew for respondent.

Horne, J.—The appellant Lee Lai Fong was charged that he "did use motor vehicle N.S. 4211 as a stage carriage without being the holder of a licence to use it as a vehicle of that class and committed an offence under sections 80 (1) and 80 (6) of the Road Traffic Enactment." There were three such charges and the appellant was convicted of all of them.

The charge appears to me to be wrongly framed in that it does not use the words of the section creating the offence. Sub-section (1) of section 80 states:—

> "No person shall cause or permit a motor vehicle to be used as a stage carriage....unless he is the holder of a licence (in this Enactment referred to as 'a public service vehicle licence') to use it as a vehicle of that class."

Sub-section (6) so far as material states:—

> "If any person causes or permits a vehicle to be used in contravention of this section....he shall be guilty of an offence against this Enactment."

There are, accordingly, two offences constituted by this section, viz., causing a vehicle to be used and permitting a vehicle to be used; and if this section is compared with section 12 (1) which makes it an offence to use, or cause or permit to be used a vehicle for which a licence under Part I is not in force; or with section 81 (6), which makes it an offence to use, or cause or permit to be used a vehicle as a road service vehicle without the proper licence; or with section 89 which makes any person driving or using a goods vehicle guilty of an offence "who shall carry any person therein or cause or permit any person to ride therein"; then I think it must be held that the offence of "using" a vehicle as a stage carriage without being the holder of a licence to use it as a stage carriage has not been constituted by section 80 sub-sections (1) and (6). The appellant therefore ought to have been charged with "causing the vehicle to be used as a stage carriage etc.".

Section 80, sub-sections (1) and (6) appear to be directed against the person who is responsible for the vehicle being used in the prohibited manner; who has not taken out the proper licence; and that will usually be the owner. Although the section is expressed in the singular, i.e., "no person . . . unless he holds a licence" the singular will include the plural; and there may, of course, be more than one person responsible for causing or permitting the vehicle to be unlawfully used. But even so, the persons aimed at are persons whose use of the vehicle is such that they should have applied for a licence before causing or permitting such use; persons who can control the use of the vehicle and who can prevent the unlawful use.

In order, however, to aid the police in their endeavours to bring offenders to book, section 113 provides, *inter alia,* that it shall be presumed until the contrary is proved that any conveyance of persons was for hire, that the passengers have been carried in consideration of separate payments, and that any person is the owner of a vehicle.

It is, in my opinion, nevertheless incumbent upon the prosecution not only to prove that the vehicle had been used in the unlawful manner, a matter they are able to do with the aid of the presumptions under section 113, but to prove that the person charged caused or permitted such user. The prosecution proved that the appellant had been seen driving the vehicle on a number of occasions when it was carrying persons and carrying them in circumstances from which the Court was, in the absence of evidence to the contrary, bound to presume a carriage for hire or reward. The appellant's own evidence and that of his father, the owner of the car, was to the effect that he is a hired driver and receives a wage of $30 per month, and drives solely under the orders and direction of his father. The appellant also took upon himself the burden of trying to rebut the presumptions by calling evidence to show that only coolies and other employees of his father were ever carried at any time. He may have understood he was being charged with causing the vehicle to be used although I doubt it.

It is now urged by Mr. Joseph in this appeal that the Magistrate ought to have found that the presumptions were rebutted, but I think the Magistrate did not take an unduly adverse view of the evidence

in rebuttal. It does not read well and I am not impressed by it. And so far as his findings go to show that the vehicle was used as a stage carriage without a licence I agree with them. But the Magistrate has not of course, the charge being framed as it was, considered whether the appellant was the person responsible for the user on the days in question, i.e., whether he caused the user. Upon the evidence I do not think he ought to have been convicted of "causing the vehicle to be used" as such evidence does not shew that he was responsible for the user. I therefore quash the convictions under section 80.

It is, however, submitted by Mr. Grattan-Bellew that the appellant in this case could have been convicted of aiding and abetting his father—employer—in the offence of causing the vehicle to be used as a stage carriage and that such conviction should be entered by this Court. But I do not agree with this submission for it appears to me to be, at the least, impracticable. Abetment by intentional aid takes place when the doing of the thing aided is an offence. Under this section the causing of the thing to be done and not the doing of the thing is the offence; and it is difficult to understand how, or to visualize circumstances in which, one person can intentionally aid another in causing a thing to be done without becoming a causator of the thing done and consequently being liable as a principal.

As to the convictions under section 12 (3), I have already held in *Low Ah Seng v. Public Prosecutor*[1], that only a licensee can be convicted under this section. These three convictions are quashed.

But the question of abetment properly arises for here it is the using of the vehicle which is made an offence and whether a conviction for abetment should be substituted depends upon the wording of the section and upon the evidence. It appears that the appellant has driven the car on many occasions on which by section 12 (5) the burden of proof in the circumstances of the case was upon the principal offender to show that the purposes for which the vehicle had been used did not call for a higher licence fee. But while the presumptions under 12 (5) can be used to show that the principle offender has committed the offence and that therefore the offence has been committed I do not think they can be used to establish that the abettor intentionally aided the principal. In some cases the paid driver must be taken to know that the offence of "using" is being committed. In *Morris v. Tolman*[2] cited in *Low Ah Seng's* case the vehicle was licensed as a van and used by the paid driver for private purposes, viz., to carry his friends and without his master's knowledge and he was clearly in fact an abettor. But as the Magistrate in that case found that the principal had not committed the offence, it was held on appeal that as by reason of the wording of section 12 (3) the offence had not been committed at all there could be no conviction for abetment. In other words there must be a finding that the principal has committed the offence. Such a finding is absent here and I cannot, therefore, substitute a conviction for abetment of the offence under section 12 (3).

At the trial it was assumed that, as there were three convictions for "using" under section 80 (6), convictions under section 51 (1) followed automatically. But these latter convictions must now be considered independently. In the circumstances of this case I do not think a charge under section 51 (1) can lie against a mere hired driver. The expression "to use a motor vehicle" in that section means to use it in the sense of having control over its use. In this case the evidence shows that it is the owner of the vehicle who is responsible, who is the user. These three convictions are accordingly quashed.

Appeal allowed.

All convictions quashed.

SHER SINGH vs. SHANKAR SINGH and ANOTHER; MOHAN SINGH (Transferee-Appellant).

[Appellate Civil Juris. (Cussen, J.) April 7, 1941]

Civil Procedure Code (Cap. 7) Section 258 — Transfer of decree by assignment — Unnecessary for transferee wishing to apply for execution first to be "placed on the record as transferee."

The Appellant, claiming to be the transferee by assignment in writing of the Decree in a suit, applied under section 258 of the Civil Procedure Code for execution of the Decree. The Registrar ruled that he should first get himself put on the record as transferee by separate application made by Summons in Chambers, and that he could then apply for execution under Section 258.

Held, that no provision of the Civil Procedure Code existed which required the transferee of a decree to apply to be "placed on the record as transferee." Such a transferee (having, if necessary, complied with the provisions of paragraph (a) of the Proviso to Section 258 of the Civil Procedure Code) has merely to file his application for execution of the decree setting out, either